Department of the Treasury

United States Customs Service

19 CFR PARTS 4, 178

(T.D. 00-61)

RIN 1515-AC35

VESSEL EQUIPMENT TEMPORARILY LANDED FOR REPAIR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide for the temporary landing in the United States of vessel equipment in need of repair, without requiring entry of that equipment under a Temporary Importation Bond (TIB). Instead, such equipment may be landed from a vessel for repair and then reladen aboard the same vessel, subject to Customs issuance of a special permit or license for the landed equipment, under an International Carrier Bond. Uncertainty had existed as to whether the relading of repaired equipment on vessels departing the United States would satisfy the TIB requirement that such merchandise be exported. The amendment eliminates this uncertainty while still allowing Customs adequate control over vessel equipment that is landed for repair and thereafter reladen aboard the same vessel.

EFFECTIVE DATE: [Insert date 30 days from date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Larry L. Burton, Office of Regulations and Rulings, 202-927-1287.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 446, Tariff Act of 1930, as amended (19 U.S.C. 1446), provides that vessels arriving in the United States from foreign ports may retain vessel equipment and other named items aboard without the payment of duty. The statute also provides, however, that any of

the named items which are landed and delivered from such a vessel are considered and treated as imported merchandise.

The cited statute is implemented by § 4.39 of the Customs Regulations (19 CFR 4.39), paragraph (b) of which provides that any articles other than cargo or baggage that are landed for delivery for consumption in this country are treated the same as any other imported article. Articles imported for consumption into the United States are subject to merchandise entry and the payment of applicable duty.

It is Customs view that when necessary equipment is unladed from a vessel only temporarily for the purpose of being repaired and then reladen aboard the vessel, it is not being delivered for consumption into the commerce of the United States. It is also clear, however, that when anything is landed in the United States, Customs has the duty and responsibility to exercise sufficient control and to protect the revenue from any unlawful introduction of merchandise into the commerce of the country.

There has been a lack of uniformity in the treatment that Customs has accorded vessel equipment temporarily landed for repair and relading. Some ports have employed Temporary Importation Bond (TIB) procedures in seeking to provide the necessary mechanisms for Customs control and the protection of the revenue, but a problem has existed with the use of a TIB for this purpose. While a TIB would adequately protect the revenue during the period when vessel equipment was in the United States, the bond provisions could only be satisfied and potential liability extinguished when the covered equipment was exported from the United States.

Exportation is defined in § 101.1 of the Customs Regulations (19 CFR 101.1), which provides that something is exported when it is separated from the goods of this country with the intent that it be made a part of the goods belonging to some foreign country. Customs does not believe that relading vessel equipment which is intended to remain aboard that vessel meets the definition of exportation. Accordingly, TIB bond liability may not be adequately terminated.

Section 4.30 of the Customs Regulations (19 CFR 4.30) provides that in all cases relevant to the present circumstances, no cargo, baggage, or other articles may be unladed from or laded upon any vessel arriving directly or indirectly from a foreign port or place, unless the Customs port director issues a permit allowing the activity (Customs Form (CF) 3171). This would provide adequate control by Customs over equipment unladings and ladings in terms of advance notice and actual knowledge.

Further, operators of vessels, or vessel agents acting in their stead, either have in place or can be required by local Customs officials to obtain International Carrier Bonds as reproduced in § 113.64, Customs Regulations (19 CFR 113.64). Paragraph (b) of that bond provision (§ 113.64(b)) obligates the bond for matters relating to the unlading, safekeeping, and disposition of merchandise, supplies, crew purchases, and other articles to be found on a vessel. This would pro-

vide adequate protection of the revenue in terms of any potential introduction of temporarily landed vessel equipment into the commerce of the United States.

Accordingly, by a document published in the **Federal Register** (64 FR 13370) on March 18, 1999, Customs proposed to add a new paragraph (g) to § 4.39 of the Customs Regulations (19 CFR 4.39(g)) to provide that equipment of a vessel arriving either directly or indirectly from a foreign port or place, if in need of repair, could be landed temporarily in order to be repaired. Unlading and relading would be in accord with the permit provisions of § 4.30, and the appropriate International Carrier Bond would be obligated as provided under § 113.64(b).

Discussion of Comment

Counsel on behalf of a vessel operating company submitted the only comment in response to the notice of proposed rulemaking. The commenter supported the proposal, stating that vessel operators would be relieved of needless and burdensome procedures by its implementation. However, the commenter suggested that the proposed rule be changed to allow repaired equipment to be reladen aboard any vessel operated by the same company that landed the equipment for repair.

Customs has determined that the suggested change should not be adopted. As previously noted, Customs Form (CF) 3171 is the document by which Customs would track and control the movement of equipment landed for repair. The CF 3171 is executed for a specific named vessel and does not extend to all vessels of the same line which may wish to lade or unlade equipment in a particular port of entry. As such, Customs believes that it can best exercise control over the relading of repaired equipment by requiring that it be placed on the same vessel which landed it for repair in the United States.

Adoption of Proposal

In view of the foregoing, and following careful consideration of the comment received and further review of the matter, Customs has concluded that the proposed amendment published in the **Federal Register** (64 FR 13370) on March 18, 1999, should be adopted as a final rule without change.

Regulatory Flexibility Act and Executive Order 12866

Because this final rule merely provides a different method to allow vessel equipment to be temporarily landed for repair without the payment of duty, it is certified pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the rule will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Nor does the document meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

PAPERWORK REDUCTION ACT

The collections of information contained in this final rule document have previously been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB control numbers 1515-0013 (Application-Permit-Special License, Unlading-Lading, Overtime Services (Customs Form 3171)) and 1515-0144 (Customs Bond Structure (Customs Form 301 and Customs Form 5297)). The document restates the collections of information without substantive change. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Part 178, Customs Regulations (19 CFR part 178), is amended to make provision for these existing information collection approvals.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Customs duties and inspection, Entry, Inspection, Merchandise, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 178

Collections of information, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Parts 4 and 178, Customs Regulations (19 CFR parts 4 and 178), are amended as set forth below.

PART 4 - VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 as well as the specific authority citation for § 4.39 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * *

Section 4.39 also issued under 19 U.S.C. 1446;

* * * * *

2. Section 4.39 is amended by adding a new paragraph (g) to read as follows:

§ 4.39 Stores and equipment of vessels and crews' effects; unlading or lading and retention on board.

* * * * *

(g) Equipment of a vessel arriving either directly or indirectly from a foreign port or place, if in need of repairs in the United States, may be unladen from and reladen upon the same vessel under the procedures set forth in § 4.30 relating to the granting of permits and special licenses on Customs Form 3171 (CF 3171). Adequate protection of the revenue is insured under the appropriate International Carrier Bond during the period that equipment is temporarily landed for repairs (see § 113.64(b) of this chapter), and so resort to the procedures established for the temporary importation of merchandise under bond is unnecessary. Once equipment which has been unladen under the terms of a CF 3171 has been reladen on the same vessel, potential liability for that transaction existing under the bond will be extinguished.

PART 178 - APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding new listings in the table in appropriate numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	*Description*	*OMB control No.*
* *	* *	*
§§ 4.10, 4.16, 4.30, 4.37, 4.39, 4.91, 10.60, 24.16, 122.29, 122.38, 123.8, 146.32, 146.34	Application-Permit-Special License, Unlading-Lading, Overtime Services (Customs Form 3171)	1515-0013
Part 113	Customs Bond Structure (Customs Form 301 and Customs Form 5297)	1515-0144
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RAYMOND W. KELLY
Commissioner of Customs

Approved: July 18, 2000
JOHN P. SIMPSON
Deputy Assistant Secretary of the Treasury

Department of the Treasury

United States Customs Service

19 CFR Part 24

RIN 1515-AC48

[T.D. 00-62]

ENDORSEMENT OF CHECKS DEPOSITED BY CUSTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect changes concerning information that authorized Customs employees are required to place on instruments (such as checks) tendered for payment of duties, taxes, and other fees and charges. These changes are designed to avoid a conflict with Federal Reserve System regulations that govern the endorsement of checks by banks.

EFFECTIVE DATE: [Insert date 30 days from date of publication of this document in the Federal Register.]

FOR FURTHER INFORMATION CONTACT: Gregory L. Pence, Branch Chief, Financial Policy Branch, Office of Finance ((202) 927-9183).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under § 24.1 of the Customs Regulations (19 CFR 24.1), procedures for the collection of Customs duties, taxes, charges, and fees are set forth. Under § 24.1(b), applicable to noncommercial importations at piers, terminals, bridges, airports, and other similar places, Customs employees authorized to collect payments may accept a personal check and must ensure that certain information is recorded on the check. Under § 24.1(b)(1), with respect to personal checks received under § 24.1(b) and certain other checks and money orders received under § 24.1(a), Customs employees must show, on the reverse side of the check or money order, their name, badge number, and the serial or other identification number from the collection voucher.

Requirements applicable to banks endorsing checks are set forth un-

der regulations of the Federal Reserve System (12 CFR 229.35). Appendix D to Part 229 of the Federal Reserve System regulations (Title 12, Chapter II)(entitled "Indorsement Standards") pertains to the endorsements of depositary, collecting, and returning banks. It sets forth the specific information that must or may be provided and requires that such information must be recorded on the reverse side of checks. The Appendix also provides that the readability, identifiability, and legibility of the depositary bank's endorsement must be protected. It cautions the depositary bank not to interfere with the readability of the endorsement, and it carefully sets forth specific requirements for collecting and returning banks to follow for the purpose of protecting that endorsement.

The requirement under the Customs Regulations that Customs employees must place information on the reverse side of monetary instruments conflicts with the purpose and intent of the requirements of 12 CFR 229.35 and App. D of Part 229 of Title 12 CFR regarding the protection of bank endorsements. For this reason, Customs issued a Notice of Proposed Rulemaking, published in the **Federal Register** (64 FR 62619) on November 17, 1999, proposing that required information be placed on the face side of monetary instruments accepted for Customs payments. The notice requested comments on the proposed amendments. No comments were received. After further consideration of this matter, Customs has determined to adopt the proposed changes as a final rule. This document amends §§ 24.1(b) and 24.1(b)(1) of the Customs Regulations, accordingly.

Executive Order 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments to the Customs Regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. These amendments regarding the endorsement of checks and other instruments will improve the processing of these instruments, without any additional burden on businesses or individuals. Accordingly, these amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. Personnel from other offices contributed in its development.

List of Subjects in 19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Fees, Financial and accounting procedures, Imports, Taxes.

Amendments to the Regulations

For the reasons stated in the preamble, part 24 of the Customs Regulations (19 CFR part 24) is amended as follows:

PART 24 - CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for part 24 and the relevant specific authority citation continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a-58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701.
Section 24.1 also issued under 19 U.S.C. 197, 198, 1648;

* * * * *

2. In § 24.1, the second and third sentences of introductory paragraph (b) and all of paragraph (b)(1) are revised to read as follows:

Section 24.1 Collection of Customs duties, taxes, and other charges.

* * * * *

(b) * * * Where the amount of the check is over $25, the Customs cashier or other employee authorized to receive Customs collections will ensure that the payor's name, home and business telephone number (including area code), and date of birth are recorded on the face (front) side of the monetary instrument. In addition, one of the following will be recorded on the face side of the instrument: preferably, the payor's social security number or, alternatively, a current passport number or current driver's license number (including issuing state). * * *

(1) Where the amount is less than $100 and the identification requirements of paragraph (a)(4) of this section have been met, the Customs employee accepting the check or money order will place his name and badge number on the collection voucher and place the serial number or other form of voucher identification on the face side
of the check or money order so that the check or money order can be easily associated with the voucher.

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RAYMOND W. KELLY
Commissioner of Customs

Approved: July 18, 2000
JOHN P. SIMPSON
Deputy Assistant Secretary of the Treasury

Department of the Treasury

United States Customs Service

[T.D. 00-63]

GUIDELINES FOR THE MITIGATION OF RECORDKEEPING PENALTIES

AGENCY: Customs Service, Treasury.

ACTION: Final guidelines.

SUMMARY: This document sets forth the final mitigation guidelines that Customs will follow in arriving at its assessment and disposition of liabilities when a party fails to comply with a lawful demand for the production of entry records resulting in a penalty being incurred under applicable law and regulations. These guidelines provide for a distinction between the treatment of persons certified as participants in Customs Recordkeeping Compliance Program and those who do not participate in the program.

EFFECTIVE DATE: These guidelines are immediately effective upon publication for all violations occurring on or after July 15, 1996.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Office of Regulations and Rulings, Penalties Branch (202) 927-2337.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (the "NAFTA Implementation Act"), Public Law 103-182, 3107 Stat. 2057. Title VI thereof contains provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or "Mod Act." Sections 6l4, 6l5, and 6l6 of the Mod Act amended sections 508, 509, and 510 of the Tariff Act of 1930, as amended (hereafter referred to as sections 508, 509, and 510) which pertain to recordkeeping requirements applicable to importers and others. (While references throughout this document, including the comments and the guidelines, are to sections of the Tariff Act of 1930, as amended, these sections cross-cite to title 19, United States Code, as follows: section 508 (19 U.S.C. 1508), section 509 (19 U.S.C. 1509), section 510 (19 U.S.C. 1510), section 592 (19 U.S.C. 1592), and section 618 (19 U.S.C. 1618).)

The Mod Act amended various provisions of the Customs laws to grant Customs authority to no longer require the presentation of certain documentation or information at the time of entry. These amendments were intended to reduce the document filing burden on importers and thereby facilitate the entry process. However, in exchange for relieving importers of the obligation to present documents at the time of entry, and in order not to jeopardize the ability of Customs to obtain those entry records at a later date, the Mod Act amended section 508 to require that importers maintain that documentation or information. Section 509 also was amended to set forth procedures for the production of records to Customs, Customs examination of those records, and for the imposition of substantial administrative penalties for a failure of a person required to keep entry records to comply, within a reasonable time, with a demand by Customs for their production.

Section 509(a), as amended by the Mod Act, requires, upon demand by Customs, the production of records required by law or regulation for the entry of merchandise. Another Mod Act amendment to section 509 added subsection 509(e) which requires the Customs Service to identify and publish a list of these entry records which are required to be maintained and produced under subsection (a)(1)(A) of section 509. This list is commonly referred to as the "(a)(1)(A)" list. The "(a)(1)(A)" list was published in the **Customs Bulletin and Decisions** on January 3, 1996, as Treasury Decision (T.D.) 96-1 and republished in the **Federal Register** on July 15, 1996, at 61 FR 36956. It is anticipated that the "(a)(1)(A)" list will change as entry requirements are revised. Penalties under section 509(g) are assessed only in cases where a record identified on the "(a)(1)(A)" list is not provided to Customs within a reasonable time after demand for its production.

On June 16, 1998, Customs published in the **Federal Register** (63 FR 32916) the final rule amending the Customs Regulations to reflect the changes to the Customs recordkeeping laws mandated by the Mod Act. The final rule moved Customs requirements regarding recordkeeping from Part 162 to Part 163 of the Customs Regulations (19 CFR Parts 162 and 163) and amended the requirements in accordance with the Mod Act. In addition, the final rule: (1) set forth, as an appendix to new Part 163 of the Customs Regulations, the previously published "(a)(1)(A)" list; and (2) included conforming amendments to various provisions within Parts 24, 111, and 143 of the Customs Regulations (19 CFR Parts 24, 111, and 143).

The monetary penalties applicable for failure to produce entry records are set forth in § 163.6(b), Customs Regulations (19 CFR 163.6(b)). Under § 163.6(b)(5) of the Customs Regulations (19 CFR 163.6(b)(5)), these penalties may be remitted or mitigated pursuant to section 618. On March 31, 1999, Customs published a Notice of Proposed Guidelines for the Mitigation of Recordkeeping Penalties in the **Customs Bulletin and Decisions** (Vol. 33, No. 13, page 20) that set forth proposed guidelines for the mitigation of recordkeeping penalties and requested comments from the public. The comment period closed on

July 1, 1999. Five commenters responded to the solicitation for comments. The comments submitted are summarized and responded to below.

DISCUSSION OF COMMENTS

Proposed Section I - Degrees of Culpability

Comment:

One comment concerned the definition of the term "negligence" in Section I(A) of the proposed guidelines which provides, in pertinent part, that a violation is determined to be negligent if the act or acts are done through the failure to exercise reasonable care "in communicating information so that it may be understood by the recipient." The commenter believes that Customs may interpret this definition to mean that a recordkeeping violation may be warranted where an importer complies with a demand for information, but Customs has difficulty understanding the records or the way in which they were organized by the recordkeeper.

Customs response:

We agree with the commenter that the definition of negligence is too broad to the extent that it includes the reference to communicating information so that it may be understood by the recipient. A penalty may be imposed under section 509(g) if a person fails to comply with a lawful demand for the production of an entry record contained in the "(a)(1)(A)" list, unless that person is excused from a penalty pursuant to one of the exceptions set forth in section 509(g)(3) and § 163.6(b)(3) of the Customs Regulations (19 CFR 163.6(b)(3)). A recordkeeping penalty relates to the production, not the clarity, of the record demanded. Accordingly, the proposed mitigation guidelines have been amended to delete from the definition of negligence the phrase in question: "or in communicating information so that it may be understood by the recipient." Of course, unclear or misleading records may result in penalties under section 592 dealing with civil liability for material false statements, acts, and omissions.

Comment:

One comment concerned the definition of the term "willful conduct" which appears in Section I(B) of the proposed guidelines: "A violation is determined to be willful under section 509 if the failure to comply with a lawful demand for the production of an entry record was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally. . . ." The commenter expressed concern that there are no definitions for the terms "voluntarily" and "intentionally" and that this definition (for willful conduct) could be interpreted broadly.

Customs response:

Customs believes that the language in question should remain unchanged. Customs finds it inappropriate to define these terms, which are of general application and are not limited to recordkeeping pen-

alty concepts. Customs is responsible, on a case by case basis, for determining whether particular culpable behavior of a recordkeeper warrants a penalty and whether it rises to the level of willfulness.

Comment:

One commenter maintained that the proposed definitions of the degrees of culpability ("negligence" and "willful conduct"), as set forth in proposed Sections I(A) and I(B), are unnecessarily confusing because they do not properly track the language of section 509. The commenter argued that the definitions do not refer to the failure to "maintain, store, or retrieve information." The commenter also noted that the proposed definition of negligence, containing the clause, "in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient," is not related to maintaining, storing, or retrieving information. In addition, the commenter stated that the portion of the proposed definition of willful conduct which concerns the failure to comply by way of a "knowing omission" does not make sense.

Customs response:

Customs does not believe it necessary to amend the definitions of negligence and willful conduct to include the phrase "failure to maintain, store, or retrieve the demanded information" since these are statutory examples which give rise to the failure to comply with a lawful demand for the production of records. The fact that these definitions do not refer to the "failure to maintain, store, or retrieve the demanded information" does not make them confusing or ambiguous. Under the heading "Degrees of Culpability" in Section I of the proposed guidelines, Customs unambiguously stated that a penalty may be imposed under section 509(g) if a person fails to comply with a lawful demand for the production of an entry record contained in the "(a)(1)(A)" list. It is the failure to produce the record that gives rise to a violation and penalty, whether this noncompliance is precipitated by a failure to maintain, store, or retrieve the subject document. Regarding the portion of the definition of willful conduct referred to by the commenter concerning failure to comply through a "knowing omission," Customs believes that this is a useful part of the definition. For instance, a recordkeeper may commit a knowing omission by, among other things, intentionally or voluntarily omitting a document or information from a submission of other documents or information in response to a lawful demand from Customs. As noted in a previous comment response, reference in the definition of negligence to "communicating information so that it may be understood by the recipient" is being removed by Customs in the final guidelines.

Comment:

One comment concerned the burden of proof for violations determined to be willful under section 509. Section I(B) of the proposed

guidelines provides that a violation is willful "if the failure to comply with a lawful demand for the production of an entry record was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by a preponderance of the evidence." The commenter noted that the definition of willful conduct is the same as that for a fraudulent violation under section 592, but the burden of proof is the "preponderance of the evidence" standard, as opposed to the more rigorous "clear and convincing evidence" standard for section 592 fraud violations. The commenter asserted that if Customs adopts the definition of fraud from section 592 as its definition of willful conduct, then the same burden of proof should be applied.

Customs response:

Unlike the language in section 592, the language of section 509 does not provide for a specific burden of proof. Specifically, Congress did not mandate any particular burden of proof for violations determined to be willful under section 509. In view of this fact, Customs has determined to apply the preponderance of the evidence standard which is the standard of proof that normally applies in civil proceedings.

Proposed Section II - Procedure for Penalty Assessment

Comment:

Two comments concerned Section II(A) of the proposed guidelines which provides that "penalties for the failure to comply with a lawful demand for production of entry records may be assessed by the appropriate Customs field officer for any violation which occurs on or after July 15, 1996, the date of publication of the '(a)(1)(A)' list in the Federal Register." These commenters argued that the correct effective date is June 16, 1998, the date that the recordkeeping regulations were published in the **Federal Register**. The commenters claimed that Customs has no basis or statutory authority to impose penalties for actions which occurred prior to publication of the final regulations.

Customs response:

As explained in the "Background" section of this notice, the Mod Act amended section 509 pertaining to recordkeeping requirements applicable to importers and others. Section 509 was amended to, among other things, require Customs to identify and make available to the importing community, by publication, a list of all records or information required by law or regulation for the entry of merchandise (referred to as the "(a)(1)(A)" list). The "(a)(1)(A)" list was published in the **Federal Register** on July 15, 1996. The legislative history is clear that Congress intended the date of publication of the "(a)(1)(A)" list to be controlling, rather than the date of the promulgation of the final regulations. Congress stated that publication of the "(a)(1)(A)" list would put importers and others on notice, from the time of that publication, that they have an obligation to maintain and produce these entry records and that substantial penalties may be imposed for the failure

to comply with a demand for production of such records. H.R. Rep. No. 361, 103rd Cong., 1st Sess., pt. 1, at 116 (1993). Moreover, Customs actually provided the importing community with notice of the sion concerning judicial proceedings and the appropriate standard of review. In contrast, Congress set forth a provision within section 592(e) concerning judicial proceedings and the standard of review at the U.S. Court of International Trade. Hence, it is within the purview of the judiciary, e.g., district courts, as opposed to Customs, to articulate and apply the appropriate standard of judicial review for section 509 violations. Accordingly, Customs does not believe that it is appropriate to amend the guidelines to state that enforcement of any penalty assessment under section 509 will be subject to de novo judicial review.

Proposed Section III - Administrative Penalty Disposition

Comment:

One comment concerned the meaning of the term "release." Specifically, this commenter argued that there is no basis for treating each line item on a consumption entry as a separate release for purposes of assessing a penalty under section 509. In support of this position, the commenter (citing 19 U.S.C. 58c(a)(9)(A)) noted that the term "release" has generally been synonymous with the term "entered" or "entry". The commenter noted that there is usually only one release per entry (citing § 141.111(b)(2) of the Customs Regulations (19 CFR 141.111(b)(2))). Accordingly, the commenter urged that a recordkeeping penalty should be assessed only once against a single consumption entry.

Customs response:

We believe the commenter's views have some merit and Customs has changed its position. The relevant statutory language references penalties for "each release of merchandise." For a negligence penalty assessment, the penalty amount will not exceed $10,000 or an amount equal to 40% of the TOTAL appraised value of the release document, whichever is less. For a willful penalty assessment, the penalty amount will not exceed $100,000 or an amount equal to 75% of the total appraised value of the release document, whichever is less. The following example is illustrative: On March 1, 2000, Customs makes a demand pursuant to section 509(a)(1)(A) and § 163.6(a) of the Customs Regulations (19 CFR 163.6(a)) for a Multiple Country Declaration as provided for in § 12.130 (19 CFR 12.130), with regard to a shipment of cotton garments imported on January 1, 2000. Of the ten line items comprising the Customs Form 3461 (CF 3461), Customs demands the declaration for line items 1 – 3, which consist of ladies cotton shorts. The total appraised value of the CF 3461 is $100,000. Line items 1 – 3 have an appraised value of $10,000, $5,000, and $2,000, respectively. The recordkeeper fails to produce the requested document for line item 3, and such failure is determined to be the result of negligence.

The statutory maximum for recordkeeping violations is 40% of the appraised value of the CF 3461 ($40,000) or $10,000, whichever is less. In this case, since 40% of the appraised value of the CF 3461 is $40,000, the maximum negligence penalty that Customs may assess for this CF 3461, under the statute, is $10,000.

Comment:

One commenter was concerned that Customs may attempt to impose recordkeeping penalties against importers in an attempt to gain access to the books and records of those companies' foreign affiliates.

Customs response:

The recordkeeping penalty guidelines are designed to be neutral, in that they are not intended to focus on any particular exporter, country, or industry. Under the statute and applicable regulations, Customs has the authority to impose recordkeeping penalties against a broad spectrum of parties. A foreign parent of an importer of record may be one of the parties who falls within the scope of section 508. Therefore, if Customs can establish the elements of a recordkeeping violation, the foreign company itself may be liable for penalties under section 509(g). Moreover, Customs will exercise its authority to gain access to records consistent with law, including sections 508 – 510.

Comment:

One comment concerned the assessment of penalties under the proposed guidelines for negligent violations against participants in the Recordkeeping Compliance Program. The commenter argued that participants in the program should be exempt from penalties for all negligent violations. The commenter believes that program participants should be assessed penalties and face possible removal from the program only if a pattern of negligent behavior can be established.

Customs response:

Under section 509(g)(7)(A), "repeated violations by the recordkeeper may result in the issuance of penalties and removal of certification under the program until corrective action, satisfactory to the Customs Service, is taken." Consequently, the first time that a participant in the Recordkeeping Compliance Program fails to comply with a lawful demand for the production of an entry record contained in the "(a)(1)(A)" list, the recordkeeper will receive a notice of violation from Customs (akin to a warning). However, if the same recordkeeper fails to comply with another lawful demand for the production of an entry record within three years from the date of the prior violation, then Customs will consider the subsequent violation to constitute a repetitive negligent violation. In cases where a participant in the program commits a repetitive negligent violation, Customs may assess a monetary penalty and may remove the participant from the program until corrective action has been taken.

Comment:

One comment concerned the factors that Customs may consider in deciding whether to issue a recordkeeping penalty in the first place. The commenter was concerned that the mitigation guidelines do not recognize that when dealing on a daily basis with thousands of paper files, it is likely that a small percentage of documents will be lost or misplaced by the best of recordkeepers. Recognizing that a recordkeeper may not be able to produce all the documents requested by Customs, the commenter suggested that Customs create some empirical standards by which to judge whether a certain threshold percentage of misplaced or lost files constitutes negligence.

Customs response:

The proposed guidelines provide that in initially deciding whether or not to issue a penalty, the appropriate Customs officer may take into account the age and nature of the documents, the overall number of documents requested versus the number of documents produced, and the overall recordkeeping performance of the person. Therefore, Customs will consider the particular factual situation surrounding a case in deciding whether to initiate a penalty. As each case is decided based upon its particular factual situation, Customs does not believe that it is feasible to create empirical standards by which to judge whether a certain percentage of misplaced or lost documents constitutes negligence under the recordkeeping statute.

Comment:

One commenter noted that in view of the penalties imposed under the recordkeeping statute, the prudent broker/filer should abandon the "paperless" entry program as a means of reducing a great deal of liability both to the broker and his client.

Customs response:

Customs disagrees strongly with this approach. Even if the recordkeeper chooses to file a "paper" entry with Customs, unless the information demanded was presented to and retained by Customs at the time of entry or was submitted in response to an earlier demand by Customs, the recordkeeper is still required to continue to maintain these documents and to produce them upon demand by Customs (section 509(g)(3)(C) and 19 CFR 163.3).

Comment:

Two comments concerned the amount of the penalties in the proposed guidelines for willful and negligent violations of section 509. The commenters argued that the penalties in the proposed guidelines are as severe as the penalties which can be imposed under section 592, and one commenter noted that the penalty guidelines for section 592 negligence violations provide for lesser penalties than the penal-

ties contained in the proposed recordkeeping guidelines. One commenter stated that the fact that such penalties will be assessed for each release of merchandise is extremely harsh and unwarranted in view of the fact that a recordkeeper may, inadvertently, repeat the same violation multiple times prior to the violation being discovered. A commenter recommended that Customs reduce the amount of the penalties for recordkeeping violations so that they are less than penalties for violations of section 592. One comment suggested that in assessing a penalty, Customs take into account the number of prior violations and whether the failure to comply with a Customs demand for information indicates a continuing course of conduct involving a number of entries.

Customs response:

Customs believes that the mitigation guidelines should remain unchanged. The statute provides for the maximum penalties allowable for recordkeeping violations and the guidelines reflect this mandate. The fact that, in some cases, the penalties for recordkeeping violations may be comparable to or greater than penalties assessed for a violation of section 592 is not relevant. Congress generally intended the two statutes to be separate and distinct. With regard to the suggestion that Customs take into account in the guidelines the number of violations, there is no statutory basis for adopting such a course of action. The statute provides that if a recordkeeper fails to comply with a lawful demand for information from Customs, a penalty will be assessed "for each release of merchandise." The statute does not differentiate between first violations and second and subsequent violations for non-participants in the Recordkeeping Compliance Program. An exception is made in the case of a first-time negligent violation committed by program participants.

Comment:

One commenter suggested that the guidelines be amended to include the opportunity to make a prior disclosure of a recordkeeping violation, using the procedures set forth in section 162.74 of the Customs Regulations (19 CFR 162.74).

Customs response:

The opportunity to make a prior disclosure of a recordkeeping violation is not specifically provided for in the recordkeeping statute. However, the fact that a recordkeeper informs Customs in writing that they are unable to produce certain "(a)(1)(A)" documents before Customs makes a formal demand for the production of these documents may be considered an extraordinary circumstance in the mitigation of a recordkeeping penalty should Customs later demand these records.

Proposed Section IV - Mitigating Factors

Comment:

One comment concerned the factors that Customs may consider in setting the proposed (pre-penalty notice) or assessed penalty (penalty notice) or in mitigating the assessed penalty for both participants and non-participants in the Recordkeeping Compliance Program. The commenter noted that section 509(g)(7)(D) provides, in part, that "any penalty issued for a recordkeeping violation shall take into account . . . the nature of the demanded records." The commenter suggested that the guidelines be amended to include as a mitigating factor the nature of the record demanded, as required by the statute.

Customs response:

Customs stated in proposed Section III(A) of the guidelines that "in deciding whether or not to issue a penalty, the deciding officer may take into account the age and nature of the documents, the overall number of documents requested versus the number of documents produced, and the overall recordkeeping performance of the person." Thus, under the guidelines, the nature of the demanded records is already a factor that Customs may consider in deciding whether or not to issue a penalty. Consequently, Customs does not believe it necessary to repeat this factor as a mitigating factor in Section IV.

Proposed Section V - Aggravating Factors

Comment:

One comment concerned the first aggravating factor: "The person required to maintain and produce records is experienced in the customs transactions to which the records relate." The commenter questioned this factor since all Customs recordkeepers will generally be experienced in their own transactions. The commenter also requested that the meaning of the term "misleading information," which appears in aggravating factor number five concerning the submission of such information, should be clarified. The commenter also believes that aggravating factor number seven - "the importer or other party has demonstrated evidence of a motive to evade the production of entry records or information" - is ambiguous and warrants a clearer definition.

Customs response:

In determining whether the experience of the recordkeeper may be considered an aggravating factor, Customs will generally consider the importing history of the importer or other person charged with a recordkeeping violation. A person who does not have a prior history of importing merchandise into the U.S. should not be considered to have the same level of expertise as a person who has been importing merchandise into the U.S. for a period of years or even months. Consequently, the failure of the more experienced importer to maintain, store, or retrieve, (and thus produce) the records or information re-

quested by Customs may be considered an aggravating factor for purposes of determining the amount of the proposed or assessed penalty or the amount of the final, mitigated penalty. Hence, this aggravating factor envisions recordkeepers of disparate experience. Customs also notes that inexperience is considered a mitigating factor (see factor seven in Section IV of the guidelines). With regard to the definition of "misleading information," Customs believes that because each case must be decided on its own unique facts, it is inappropriate for Customs to attempt to state specific examples of types of information that may be considered misleading. Customs does not believe that it is appropriate to include a more specific definition of evidence of a "motive to evade the production of entry records or information" since each case is unique and must be decided based upon the particular facts.

Proposed Section VI - Responsibilities

Comment:

One comment pertained to the fact that the Port Directors will be responsible for ensuring that the provisions of these guidelines are implemented uniformly within their respective local jurisdictions. The commenter was concerned that since each Port Director will have the authority to interpret the guidelines, the guidelines will not be applied uniformly across the country.

Customs response:

In order to ensure that there is consistency among all the ports in applying the guidelines, Headquarters (Office of Regulations and Rulings, Penalties Branch) will review all pre-penalty notices, prior to issuance and regardless of the penalty amount, for a period of one year after implementation of the final guidelines. Further, Headquarters always will have the discretion to review a pre-penalty notice if warranted by the circumstances. Additionally, Fines, Penalties, and Forfeitures Officers who will possess the authority to interpret the guidelines are required to follow Headquarters policies. This should enhance uniformity.

CONCLUSION

After analysis of the comments, Customs has decided to adopt as final the proposed guidelines as published, with certain editorial changes and the following changes noted in the above discussion of comments: (i) The definition of "negligence" in the proposed guidelines has been modified by deleting the following language: "or in communicating information so that it may be understood by the recipient," and (ii) the term "release of merchandise" will not pertain to each line item of the CF 3461 but to the entire CF 3461. Also, upon general review and further consideration, Customs has decided to add the following language to the first sentence of mitigation factor 6 in Section IV of the guidelines, "or established by that official's contemporaneously created written record, . . ."

The final guidelines as adopted follow:

GUIDELINES FOR THE MITIGATION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1509

BACKGROUND

Pursuant to Title VI of the North American Free Trade Agreement Implementation Act (the "NAFTA Implementation Act"; Public Law 103-182, 107 Stat. 2057), commonly referred to as the Customs Modernization Act or "Mod Act," a person who is subject to Customs recordkeeping requirements may be liable for penalties, unless excused (upon meeting certain criteria), for failure to comply with a lawful demand for the production of entry records. In all cases, the amount of the penalty will depend upon whether the failure to produce the records was the result of willful conduct or negligence. These penalties are provided for under section 509 of the Tariff Act of 1930, as amended (19 U.S.C. 1509; hereafter section 509; also referred to in these guidelines as the recordkeeping statute).

In addition to any penalty that may be imposed under section 509, if the requested entry records relate to the eligibility of merchandise for a special rate of duty, the entry covering the merchandise will be liquidated or (notwithstanding 19 U.S.C. 1514 and 1520) reliquidated under the column 1 general rate of duty or, if determined to be applicable by Customs, under the column 2 rate of duty.

The assessment of a penalty under section 509 for the failure to produce entry records for Customs inspection will not limit or preclude the Customs Service from issuing, or seeking the enforcement of, a Customs summons.

Specific procedures for issuing a pre-penalty notice (notice of intent to assess a penalty claim) and a penalty notice (notice of assessed penalty claim) were not set forth in section 509. Therefore, Customs will follow the procedures that are set forth in section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592; hereafter section 592) and which are found in Parts 162 and 171 of the Customs Regulations (19 CFR Parts 162 and 171).

The recordkeeping statute, under section 509(g)(5), provides that any person against whom administrative penalties have been assessed thereunder will be able to petition for remission or mitigation of those penalties under section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618; hereafter section 618). The below guidelines for recordkeeping violations will be used by the Customs Service in its disposition of penalties assessed under section 509. In addition, it is intended that these guidelines also will be applied by Customs officers in initially proposing a penalty (pre-penalty notice) and finally assessing a penalty (penalty notice) under section 509(g), prior to the mitigation stage. Except as provided in section 509(g)(4), the assessment of recordkeeping penalties is not an exclusive remedy. Customs administrative disposition of penalties under section 509, determined in ac-

cordance with these guidelines, does not in any way affect the authority of the U.S. District Court to impose monetary penalties or sanctions for the failure to produce entry records summoned by Customs.

In these guidelines, the term "person" is used when referring to an entity subject to the requirements of section 509. (See sections 509(a)(1)(B) and 509(g), and 19 CFR 163.6.) In addition, in these guidelines, the term "entry record" or "record" is used to represent the "information" referred to in section 509(g) and the "records," "documents," and "information" referred to in the "ppendix to 19 CFR Part 163 (the "(a)(1)(A)" list). (See also sections 509 (a)(1)(A) and 509(g)(1), and 19 CFR 163.1(a) and 163.1(f).)

I. Degrees of Culpability

In general, a penalty may be imposed pursuant to section 509(g) if a person subject to the provisions of section 509 fails to comply with a lawful demand by Customs for the production of an entry record contained in the "(a)(1)(A)" list and that person is not excused from a penalty pursuant to one of the exceptions set forth in section 509(g)(3) and § 163.6(b)(3) of the Customs Regulations (19 CFR 163.6(b)(3)). The "(a)(1)(A)" list consists of records that are required for the entry of merchandise and which must be produced upon a demand issued by Customs under section 509(a)(1)(A). (See App. to 19 CFR Part 163.) There are two degrees of culpability for penalties under section 509(g) which are defined as follows:

(A) Negligence: A violation under section 509 is determined to be negligent if the failure to comply with a lawful demand for the production of an entry record results from an act or acts (of commission or omission) done through the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts, drawing inferences therefrom, or in ascertaining the offender's obligations under the statute.

(B) Willful Conduct: A violation under section 509 is determined to be willful if the failure to comply with a lawful demand for the production of an entry record was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by a preponderance of the evidence.

II. Procedure for Penalty Assessment

(A) Commencement of Penalty Actions - Penalties under section 509 for failing to comply with a lawful demand for the production of entry records may be assessed by the appropriate Customs field officer for any violation which occurs on or after July 15, 1996, the date of publication of the "(a)(1)(A)" list in the **Federal Register**.

(B) Issuance of Pre-penalty and Penalty Notices - The procedures and requirements which have been set forth relative to penalties and petitioning rights under section 592 will be followed, to the extent practical, where Customs has reasonable cause to believe that a violation of section 509 has occurred. (See 19 CFR 162.77 - 79 and 19 CFR

Part 171.) As July 15, 1996, is the date Customs may commence the imposition of penalties under the recordkeeping statute, no pre-penalty notice, regardless of the monetary penalty amount, issued from July 15, 1996, through a one year period commencing on the date of implementation of these final guidelines, will be issued by the appropriate Customs field officer prior to Customs Headquarters (Office of Regulations and Rulings, Penalties Branch) review and approval. After the conclusion of the one year period, this requirement will cease; however, Headquarters, in its own discretion, may review a pre-penalty notice if warranted by the circumstances. Any penalty imposed under section 509 may be remitted or mitigated under section 618. Part 171, Customs Regulations (19 CFR Part 171), sets forth the general procedures for filing a petition for remission or mitigation of a fine, penalty, or forfeiture incurred under any law administered by Customs.

In initially deciding whether or not to issue a penalty under section 509(g), the appropriate Customs officer may take into account the age and nature of the documents, the overall number of documents requested versus the number of documents produced, and the overall recordkeeping performance of the person.

III. Administrative Penalty Disposition

(A) Mitigation Guidelines - Once a monetary penalty is incurred (penalty notice issued) under section 509(g) for failure to produce "(a)(1)(A)" entry records within a reasonable time of a lawful demand, such penalty may be remitted or mitigated under section 618 if it is determined that there exist circumstances that justify remission or mitigation. The below guidelines for recordkeeping violations will be used by the Customs Service in its disposition of penalties assessed under section 509.

In addition to being used as mitigation guidelines, these guidelines are intended to be applied by Customs officers in initially arriving at the proper assessment of monetary penalties, at both the proposed penalty and assessed penalty stages. In this regard, once it is determined that a penalty will be issued, the appropriate Customs officer, in initially determining the amount of the penalty, will consider the entire case record, taking into account the presence of any mitigating or aggravating factors. Any such factors applied should be set forth in the pre-penalty and penalty notices.

In addition to administrative penalties assessed under section 509, the Mod Act recognizes the authority of courts to impose monetary penalties pursuant to section 510(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1510(a); hereafter section 510(a)) for the failure to produce records summoned by Customs pursuant to section 509. Moreover, it should be understood that these guidelines do not limit or preclude the Customs Service from issuing or seeking the enforcement of a customs summons.

(B) Dispositions - Liabilities incurred under section 509 will be miti-

gated, as appropriate, and after submission of a petition under section 618, in accordance with the following guidelines:

(1) Non-Participants in Recordkeeping Compliance Program -

(a) Definition - Non-participants in the Recordkeeping Compliance Program are all persons required to maintain records who have not been certified by Customs to participate in the Recordkeeping Compliance Program (referred to in this subsection as non-participants).

(b) In cases where a non-participant in the Recordkeeping Compliance Program fails to comply with a demand for the production of records required to be maintained under section 509(a)(1)(A), Customs may mitigate the penalty amount as set forth below.

(i) Negligent Violations - Penalty dispositions for a negligent violation committed by a non-participant in the Recordkeeping Compliance Program will be calculated as follows: If the violation for non-compliance (failure to timely produce a demanded record) is a result of the negligence of the person in maintaining, storing, retrieving, or producing the demanded entry record, such person will be subject to a penalty, for each release of merchandise, not to exceed the lesser of an amount ranging from a minimum of $5,000 to a maximum of $10,000 or an amount ranging from a minimum of 20 percent of the appraised value of the merchandise to a maximum of 40 percent of the appraised value of the merchandise.

(ii) Willful Violations - Penalty dispositions for a willful violation committed by a non-participant in the Recordkeeping Compliance program will be calculated as follows: If the violation for non-compliance (failure to timely produce a demanded record) results from the willful failure to maintain, store, retrieve, or produce demanded entry records, the penalty for each release will be the lesser of an amount ranging from a minimum of $50,000 to a maximum of $100,000 or an amount ranging from a minimum of 45 percent of the appraised value of the merchandise to a maximum of 75 percent of the appraised value of the merchandise.

(c) Remission of Claim - If the Customs field officer believes that a claim for monetary penalty should be remitted or mitigated for a reason not set forth in these guidelines, the Customs field officer should first seek approval from the Chief, Penalties Branch, Customs Service Headquarters (Office of Regulations and Rulings).

(2) Participants in the Recordkeeping Compliance Program -

(a) Description of Program - The Customs Recordkeeping Compliance Program (sections 509(f) and 509(g)(7), and 19 CFR 163.12) is open to all parties listed in section 508(a) (19 U.S.C. 1508(a); hereafter section 508(a)) and § 163.2(a) of the Customs Regulations (19 CFR 163.2(a)). It is a voluntary program under which persons certified as participants (referred to in this subsection as participants) by Customs may be eligible for an alternative to penalties that otherwise might be assessed under section 509(g) and § 163.6(b) of the Customs Regulations (19 CFR 163.6(b)) for failure to produce a demanded entry record. In general, a special alternative procedure applies in the case of negli-

gent violations of section 509 committed by participants in the Recordkeeping Compliance Program who are generally in compliance with its procedures and requirements. However, even where a participant is eligible for an alternative to a monetary penalty, participation in the Recordkeeping Compliance Program has no limiting effect on Customs authority to use a summons, court order, or other legal process to compel the production of records by the participant.

(b) Certification Requirements for Participants in the Recordkeeping Compliance Program - A person may be certified as a participant in the Recordkeeping Compliance Program after meeting the general recordkeeping requirements established under section 509(f) and § 163.12(b)(3) of the Customs Regulations (19 CFR 163.12(b)(3)). Certified participants are those persons who are required to maintain records under section 508(a) and implementing regulations and who have recordkeeping systems certified by Customs under a Recordkeeping Compliance Program.

(c) Procedures for Participants in Recordkeeping Compliance Program -

(i) First-time negligent violations made by participants in the Recordkeeping Compliance Program (section 509(g)(7) and 19 CFR 163.12(d)). Written Notice of Violation - In the absence of willfulness or a repetitive negligent violation, when a participant in the Recordkeeping Compliance Program, who is generally in compliance with its procedures and requirements, does not timely produce a demanded entry record for a release of merchandise, or fails to timely provide the information contained in the demanded entry record by acceptable alternative means, Customs will issue a written notice (warning letter) of violation to the participant in lieu of a pre-penalty notice. A repetitive negligent violation is any failure to comply with a lawful demand for the production of an entry record contained in the "(a)(1)(A)" list which occurs within three years from the date of the previous violation.

(ii) The contents of the notice of violation issued to a participant in the Recordkeeping Compliance Program for failure to produce a demanded entry record are set forth in section 509(g)(7)(B) and § 163.12(d)(2) of the Customs Regulations (19 CFR 163.12(d)(2)). Within a reasonable time after receiving written notice of a recordkeeping violation, the participant will notify the Customs Service of the steps it has taken to prevent a recurrence of the violation. (See section 509(g)(7)(C) and 19 CFR 163.12(d)(3).) A "reasonable time" will be determined by Customs on a case by case basis, with opportunity, where appropriate, for extension of time.

(iii) Willful or repetitive negligent violations by participants in the Recordkeeping Compliance Program - When a participant in the Recordkeeping Compliance Program commits a repetitive negligent violation or a willful violation, the issuance of monetary penalties is appropriate, as may be removal from the program until corrective action, satisfactory to the Customs Service, is taken. In such cases,

the penalty assessment guidelines (for negligent violations and willful violations) that apply to non-participants in the Recordkeeping Compliance Program will be applied.

(iv) Example - A participant in the Recordkeeping Compliance Program files an entry summary on January 1, 1999, for a shipment of telephones. By letter dated February 1, 1999, Customs makes a written demand pursuant to section 509(a)(1)(A) and § 163.6(a) of the Customs Regulations (19 CFR 163.6(a)) for the production of the invoice covering the telephones listed on the entry summary. If the participant fails to produce the invoice for the subject merchandise within the specified time period, and such failure is the result of negligence, Customs will issue a written notice of violation to the participant. On April 1, 1999, Customs makes another lawful written demand of the same participant in connection with an entry of televisions, this time for the production of a GSP declaration. The participant's negligent failure to produce the GSP declaration for the entry of the televisions within the specified time period constitutes a repetitive violation. Accordingly, Customs may assess a penalty for the second violation using the guidelines for negligent violations applicable to non-participants in the Recordkeeping Compliance Program.

IV. Mitigating Factors

The following factors will be considered in mitigation of the assessed penalty for both participants and non-participants in the Recordkeeping Compliance Program. (These factors will also be considered in initially determining the amount of the proposed and assessed penalty.) The case record must sufficiently establish their existence. The following list is not all-inclusive.

1) Communications are impaired because of a language barrier or because of the mental condition or a physical ailment of the violator;

2) The violator cooperates with Customs officers. To obtain the benefit of this factor, the violator must exhibit extraordinary cooperation beyond that expected from a person under investigation for a Customs violation;

3) The violator takes immediate remedial action. This factor, applicable in appropriate cases, requires the production of the demanded entry records prior to the issuance of a Penalty Notice. The violator must provide evidence that, immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects. Customs encourages immediate remedial action to help prevent future incidents of non-compliance;

4) The violator has a prior good record. This factor will be considered only if the violator is able to demonstrate a consistent pattern of importations without violation of section 509 or any other statute prohibiting false or fraudulent importation practices. This factor will not be considered for a willful violation;

5) Inability to pay the Customs penalty. The violator claiming the existence of this factor must present documentary evidence to sup-

port it, including copies of income tax returns for the previous three (3) years and an audited financial statement for the most recent fiscal quarter. In certain cases, Customs may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (e.g., examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay);

6) Contributory Customs Error. This factor includes misleading or erroneous advice given by a Customs official *in writing* to the violator, or established by that official's contemporaneously created *written* record, but only if the violator reasonably relied upon the information and fully and accurately informed Customs of all relevant facts. The concept of comparative negligence may be applied in determining the weight to be assigned to this factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty claim will be canceled. If the Customs error contributed to the violation, but the violator is also culpable, the Customs error is to be considered a mitigating factor;

7) The violator is inexperienced in the customs transactions to which the records relate; or

8) The violator, in good faith, sufficiently complies with the demand for the production of records, in comparison to the total number of importations for which records are requested. This applies as a mitigation factor where the violator's level of compliance is not substantial enough to avoid the penalty under section 509(g)(3)(B).

V. Aggravating Factors

Certain aggravating factors may be considered by Customs in evaluating a claim for mitigation of the assessed penalty. (These factors will also be considered in initially determining the amount of the proposed and assessed penalty.) The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violation, but may have the effect of offsetting the presence of mitigating factors. The following factors will be considered aggravating factors. The case record must sufficiently establish their existence. The following list is not all-inclusive.

1) The violator is experienced in the customs transactions to which the records relate;

2) The records were concealed, destroyed, or withheld to evade U.S. law;

3) The violator exhibited aggravating behavior, including extreme lack of cooperation, verbal or physical abuse, or attempted destruction of records;

4) The violator has a prior recordkeeping violation for which a final administrative finding of culpability has been made;

5) The violator has provided misleading information concerning the violation;

6) The violator has obstructed an investigation or audit; or

7) The violator has demonstrated a motive to evade the production of entry records or information requested by Customs.

VI. Responsibilities

The Fines, Penalties, and Forfeitures Officer will be responsible for ensuring that the provisions of these guidelines are implemented uniformly within the local jurisdiction. Guidance concerning the application of these guidelines may be requested from the Chief, Penalties Branch, Headquarters ((202)927-2344), or the appropriate Assistant Chief Counsel or Associate Chief Counsel office. The statements made herein are not intended to create or confer any rights, privileges, or benefits for any private person, but are intended merely for internal guidance.

RAYMOND W. KELLY
Commissioner of Customs

Dated: September 14, 2000